Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-572

HAROLD JAMES JENKS - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS

HAROLD JAMES JENKS
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TABLE OF CITATIONS

	PAGE
Billiteri v. United States Board of Parole, 541 F. 2d 938	3
Kortness v. United States, 514 F. 2d 167	3
Stead v. United States, 531 F. 2d 872	3
Thompson v. United States, 536 F. 2d 459	3
United States v. DiRusso, 535 F. 2d 673	3
United States v. Hayman, 342 U. S. 205	3–4
United States v. Randle, 408 F. Supp. 5	3
United States v. Salerno, Et Al. 538 F. 2d 1005	3
Wright v. United States Board of Parole ____ F. 2d ____ (No. 76-2454 Sixth Circuit decided June 13, 1977)	3

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UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS

OPINION BELOW

The opinion of the Sixth Circuit Court of Appeals was entered on June 17, 1977. This decision will not be published. A copy of that opinion is presented to the Court in Appendix A, attached hereto.

JURISDICTION

The opinion of the Sixth Circuit Court of Appeals was rendered and entered on June 17, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

A. *Whether an issue raised via 28 U.S.C. § 2241 may also be raised via 28 U.S.C. §2255.*

B. *Whether the sentencing Court retains jurisdiction during the entire execution of the sentence.*

STATUTES INVOLVED

18 U.S.C. § 924(a), 28 U.S.C. § 2241 and 2255. The verbatim language of these statutes is set forth in Appendix B, attached hereto.

STATEMENT OF THE CASE

On September 20, 1976 the petitioner, HAROLD JAMES JENKS, submitted a motion via 28 U.S.C. § 2255 to the United States District Court in Dayton, Ohio to vacate or modify his four (4) year 18 U.S.C. § 924(a) sentence that had been altered to one that had no statutory equivalent, a non-parolable sentence, by the rubber-stamp application of United States Parole Commission "guidelines."

Both the District Court and the Sixth Circuit Court of Appeals ruled that the issues raised by petitioner could only be raised via 28 U.S.C. § 2241 in the judicial district wherein the petitioner is incarcerated.

REASONS FOR GRANTING THE WRIT

A. Rule 19(1)(b), Rules of the Supreme Court, Is Applicable in That the Third, Seventh, and Eighth Circuits Have Held That the Sentencing Court Retains Jurisdiction of the Sentence Including Rectifying the Actions of the United States Parole Commission While the First, Second, and Sixth Circuits Have Maintained That the Sentencing Court Loses Jurisdiction 120 Days After the Final Sentence.

The Third, Seventh, and Eighth Circuit cases supporting the petitioner's position are *Kortness* v. *United States,* 514 F. 2d 167; *Stead* v. *United States,* 531 F. 2d 872, 875; *United States* v. *Randle,* 408 F. Supp. 5, and *United States* v. *Salerno,* 538 F. 2d 1005.

The First, Second, and Sixth Circuit cases against the petitioner's position are *United States* v. *DiRusso,* 535 F. 2d 673; *Thompson* v. *United States,* 536 F. 2d 459; *Billiteri* v. *United States Board of Parole,* 541 F. 2d 938, and *Wright* v. *United States Board of Parole,* —— F. 2d —— (No. 76-2454 Sixth Circuit decided June 13, 1977).

B. Rule 19(1)(b) Is Also Applicable in That a Federal Question Has Been Decided in a Way in Conflict With at Least One Applicable Decision of the Supreme Court.

United States v. *Hayman,* 342 U. S. 205 was decided in 1952:

> The motion remedy broadly covers all situations where the sentence is "open to collateral

attack." As a remedy, it is intended to be as broad as habeas corpus.

Hayman @ 217.

What *Hayman* actually means a quarter century later appears to need reclarification.

CONCLUSION

The reasons for granting the writ, set forth above, clearly enunciate substantial questions of federal and constitutional law. These issues have led to a great deal of confusion in the lower courts and should be settled by this Court. We urge this Court to grant certiorari to decide these questions.

Respectfully submitted,

(s) HAROLD JAMES JENKS
Reg. No. 30636—117

(s) MICHAEL H. BROWN
Reg. No. 81856—158
Inmate Assistant to Litigant

Subscribed and Sworn to before me this 27th day of June, 1977.

(s) JAMES B. JOHNS
United States Parole Officer
Authorized by the Act of
July 7, 1950 to administer
oaths (18 U.S.C. 4004)

CERTIFICATE OF SERVICE

One (1) copy of the foregoing brief for petitioner was mailed June 29, 1977 via certified mail to:

Mr. William W. Milligan, U. S. Attorney, Dayton, Ohio 45402

Soliciter General, Department of Justice, Washington, D. C. 20530

U. S. Parole Commission, Department of Justice, Washington, D. C.

(s) HAROLD JAMES JENKS

APPENDIX

APPENDIX A

No. 76-2699

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HAROLD JAMES JENKS, - - - *Petitioner-Appellant,*

v.

UNITED STATES OF AMERICA, - *Respondent-Appellee.*

ORDER—Filed June 17, 1977

Before PHILLIPS, Chief Judge, and LIVELY and ENGEL, Circuit Judges.

Harold James Jenks, a prisoner in the United States Penitentiary at Terre Haute, Indiana, filed this action in the United States District Court for the Southern District of Ohio, the sentencing court, pursuant to 28 U.S.C. § 2255. The District Court treated the motion to vacate sentence under § 2255 as a petition for habeas corpus and denied relief.

In his motion to vacate sentence, Jenks attacks guidelines promulgated by the United States Parole Commission and the effect of these guidelines upon his sentence.

In *Wright* v. *United States Board of Parole,* ____ F. 2d ____ (No. 76-2454, 6th Cir., decided June 13, 1977), this court held that decisions of the United States Parole Commission are not reviewable under § 2255 and can only be

reviewed under 28 U.S.C. § 2241. Since Jenks is confined in Indiana, the United States District Court for the Southern District of Ohio has no jurisdiction.

Accordingly, it is ORDERED that the judgment of the District Court be vacated and the case is remanded with instructions to dismiss the petition for lack of jurisdiction.

Entered by order of the court.

(s) John P. Hehman
Clerk

APPENDIX B

STATUTES INVOLVED

18 U.S.C. § 924(a)

Whoever violates any provision of this chapter (USC 921-928 of this title) or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter (18 USC 921-928) to be kept in the records of a person licensed under this chapter (18 USC 921-928), or in applying for any license or exemption or relief from disability under the provisions of this chapter (18 USC 921-928), shall be fined not more than $5,000 or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

28 U.S.C. 2241(a)

Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district wherein the restraint complained of is had.

28 U.S.C. 2255

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.